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STATE OF MICHIGAN
DEPARTMENT OF LABOR & ECONOMIC GROWTH
LANSING

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Analysis of Enrolled House Bills 4416-7

Topic: Real Estate Brokers
Sponsor: Representatives Schuitmaker and Farrah
Co-sponsors: None
Committee: House Regulatory Reform
Senate Economic Development and Regulatory Reform

Date Introduced: March 6, 2007

Date Enrolled: March 20, 2008

Date of Analysis: March 20, 2008

Position: The Department of Labor & Economic Growth supports the bills.

Problem/Background: Computer technology has changed the real estate industry, empowered consumers, and stimulated the emergence of new business models. These include limited service brokers who provide services to consumers on an *a la carte* basis. Consumers purchase only those services they want from the broker. For instance, a consumer may want to handle most of the transaction personally but may want to take advantage of the market power provided by the local Multiple Listing Service (MLS). By purchasing an MLS-only package, the consumer's home is listed on the MLS. The broker receives a flat fee from the broker for this service rather than the traditional percentage compensation for traditional full-service brokers. Some brokers provide services not only through the traditional model but also as fee-for-service brokers.

Many states have enacted bills mandating minimum levels of professional real estate services which brokers licensed in that state would be required to perform for clients. This is in response to the belief that "cut rate" or "discount" brokers either do not provide essential services or intentionally mislead the public. This is the result of the discount broker contracting to provide a laundry list of services, often priced separately, as opposed to the full range of services typically expected of brokers in real estate transactions. The United States Department of Justice and the Federal Trade Commission have written letters opposing legislation in some of these states on the basis that they limit consumer choice. Seventeen states currently have minimum service laws. These states include Alabama, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Missouri, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin. In addition, a few states, like Kentucky and New Mexico, have promulgated rules specifying the services brokers are required to provide.

Description of Bill: The bills amend Article 25 of the Occupational Code to establish a framework in law for limited service agreements. House Bill 4416 lists the fiduciary duties that a real estate broker or salesperson owes to the client. The duties, which are currently recognized in Common Law but are not specified in statute, are:

- The exercise of reasonable care and skill in representing the client and carrying out the responsibilities of the agency relationship.
- The performance of the terms of the service provision agreement.
- Loyalty to the client's interest.
- Compliance with state laws, rules, and regulations and any applicable federal statutes or regulations.
- Recommendation to the client to obtain expert advice related to material matters when necessary or appropriate.
- An accounting in a timely manner of all money and property received by the agent in which the client has or may have an interest.
- Confidentiality of all information, including the duty not to disclose confidential information to any licensee who is not an agent of the client.

The bill also lists five minimum services which are required to be provided by the real estate broker or salesperson pursuant to a service provision agreement unless expressly waived by the client. These are:

- When representing a seller or lessor, marketing of the client's property in the agreed manner.
- Acceptance of delivery and presentation of offers and counteroffers to buy, sell, or lease the client's property or the property the client seeks to purchase or lease.
- Assistance in developing, communicating, negotiating, and presenting offers, counteroffers, and related documents or notices until a purchase or lease agreement is executed and all contingencies are satisfied or waived.
- Provide assistance as necessary to complete a purchase transaction under the terms specified in the purchase agreement.
- Furnish, or cause to be furnished, a complete and detailed closing statement as required by the department's rules.

The second, third, and fourth services may be waived under a limited service agreement. The fifth service would not apply in most limited service arrangements, because the broker is not involved in the closing. The House amended the bill to incorporate the text of the department's rule regarding the furnishing of a closing statement. The original bill simply made reference to the rule.

House Bill 4417 amends the agency disclosure provisions in Article 25 and includes the form to be used by a client in waiving certain minimum services required in House Bill 4416.

Summary of Arguments

Pro: The Michigan Association of Realtors endorses the "Broker Responsibility Act" to assure that consumers of real estate services receive the minimum level of service that can be expected (and would be mandated if passed) in an exclusive seller's agent real estate agreement. MAR argues that "cut rate" or "discount" brokers mislead the public by giving the appearance that they represent sellers and actually provide few of the generally-accepted professional real estate services in the transaction.

These bills fit within the framework established by DLEG in an August 2006 memo. The bills do not impede consumer choice. They preserve the basic fiduciary duties owed by all real estate brokers to their clients. They promote informed decision-making by consumers. Finally, they do not discriminate

against or unreasonably restrict or limit any real estate business model, whether it is an emerging model or a more traditional one.

The version of the bills introduced in 2007 is based on a model enacted in Ohio in 2006. Even the United States Department of Justice and the Federal Trade Commission, who have strongly opposed limited service legislation in other states, have indicated that they do not oppose the Ohio legislation.

Response: Although the United States Department of Justice stated in an October 19, 2005 letter to the Ohio Association of Realtors that the proposed Ohio approach seemed sensible, it also stated that "minimum service legislation seems unnecessary given the lack of evidence that fee-for-service brokers have harmed Ohio consumers". The department stated in a March 7, 2007 letter to Rhode Island legislators that they prefer an approach used in Virginia that requires full disclosure of services received and not received. They stated in this letter that the Ohio law "requires more effort on the part of the consumer, and thus is less desirable than the Virginia approach, but it is far preferable from the standpoint of competition and consumer choice to the mandatory requirements. . ."

Con: The face of real estate practice is evolving. Most buyers do extensive research on the Internet prior to contacting a licensee. Sellers are more knowledgeable regarding pricing and marketing; often these sellers want to participate in the sale of their home and do not want to be mandated to utilize the services of a full-range broker. It would seem that efforts to eliminate this competition or market-driven pricing would be seen as anti-trust or anti-consumer. Apparently the federal government agrees. The Federal Trade Commission and United States Department of Justice have opposed minimum service regulations in many states.

If a seller tries to sell a home without a professional, he or she may run into title problems or other obstacles to closing and then rely on the buyer's agent to take whatever action is needed to make the transaction take place. This puts the buyer's agent in the uncomfortable position of now being, in effect, a dual agent.

Response: While some buyer's brokers complain that they believe they are put in a dual agency relationship by a seller who relies on the buyer's broker to do what is necessary to effect a closing, under current law, it becomes a contractual matter between the parties, and requires full disclosure.

These bills require the department to regulate contractual issues between a licensee and a consumer, and uses vague, general language as well. Both of these will cause enforcement difficulties by requiring the department to interpret contracts and decide the meaning of statutory language that is vague and nonspecific, such as "related document," "assistance" or "assistance as necessary."

The bills are unnecessary. The department has seen no evidence of public harm relating to brokers providing limited services or MLS listing-only services.

Fiscal/Economic Impact

(a) Department

Budgetary: The bills will have no direct budgetary impact on the department.

Revenue: The bills will have no effect on department revenue.

Comments:

(b) State

Budgetary: The bills will have no budgetary impact on the state.

Revenue: The bills will have no effect on state revenue.

Comments:

(c) Local Government

Comments: The bills will not affect local governments.

Other State Departments: The Department of Attorney General may have an interest in the bills.

Any Other Pertinent Information: The Michigan Association of Realtors has been promoting this concept. Similar bills were introduced in the last session and were based on an Illinois law. These bills were opposed by the Department of Labor & Economic Growth, Attorney General, Federal Trade Commission, and United States Department of Justice. DLEG suggested consideration of an alternative approach that had been used in Ohio. The current bill is based on the Ohio model.

Administrative Rules Impact: It is possible that the department's rules will have to be modified if these bills become law. The text of the department's rule relating to providing a detailed closing statement is incorporated into both bills.